MEMO TO : Coyote Station and Coyote Creek Mining, LLC
Mercer County, North Dakota

FROM : David Stroh
North Dakota Environmental Engineer

RE : Stationary Source Determination

DATE : March XX, 2019

Introduction

This review addresses a source determination as to whether emissions from Otter Tail Power Company – Coyote Station (CS) and Coyote Creek Mining Company (CCMC) mine must be aggregated when determining stationary source applicability for the Prevention of Significant Deterioration of Air Quality (PSD), 1990 Clean Air Act Amendments (CAAA) Section 112 air toxics, and Title V (Part 70) operating permit programs; herein referred to as a "source determination". The federal PSD, CAAA Section 112 and Part 70 requirements are incorporated into the North Dakota Air Pollution Control Rules (NDAPCR) and the North Dakota Department of Health (Department) has primary responsibility for implementing the requirements in the state of North Dakota. Under these rules, the Department has the authority to make this source determination based on the facts of the situation.

Under the PSD rules, a single stationary source is considered to be all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" as described in the *Standard Industrial Classification Manual, 1972,* as amended by the 1977 Supplement. The test to determine if sources must be aggregated is commonly referred to as the three-part test.

Under CAAA Section 112 and Part 70, a two-part test is used; this includes the common control and contiguous or adjacent property criteria discussed above. Part 70 has additional language which includes "common control of the same person belonging to a single major industrial grouping" (similar to the PSD three-part test).

For each of the above stationary source determination requirements, all of the criteria must be met for any two or more facilities to be aggregated and considered a single stationary source.

Common Control

An April 30, 2018 EPA letter regarding Meadowbrook Energy, LLC (herein referred to as the Meadowbrook Letter) provides guidance on interpreting the common control criteria for source determinations. The Meadowbrook Letter emphasizes the need for one entity to have "the power or authority to dictate the outcome of decisions of another entity" and not just "the ability to influence" for sources to be aggregated. The Meadowbrook Letter also recognizes the potential

for Title V and New Source Review (NSR) regulatory implications for aggregating two facilities (single source) which cannot exercise control over the "pollutant-emitting activities" of the other entity. As directed on page 8 of the Meadowbrook Letter and a plain language reading of the NSR definition for "Building, structure, facility, or installation" it directly references "pollutant-emitting activities" when defining what constitutes a source. Therefore, source determinations are to be made with regards to which entity has control over and monitoring of air pollution emissions.

To ensure a proper source determination for CS and CCMC is made regarding the common control criteria, the Department reviewed the Lignite Sales Agreement (LSA) dated October 12, 2012 between Coyote Creek Mining Company, L.L.C. and Otter Tail Power Company, Northern Municipal Power Agency, Montana-Dakota Utilities Co., and Northwestern Corporation. Based on the LSA and the Meadowbrook Letter, the Department completed this source determination following the guidance on common control (i.e. the power or authority to dictate decisions) and on who has the control over decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements. See Meadowbrook Letter Part IV pages 6 through 11 for complete details (full discussion of the criteria to be considered). The guidance from the Meadowbrook Letter is to focus on pollution emitting activities and which entity has the ultimate responsibility for compliance with the control and monitoring of these activities.

Upon review of the LSA between CCMC (seller) and CS (buyer), it is clear the facilities are operated independently and not under common control. LSA Section 21 establishes that CCMC and CS are separate and have the independent responsibility to comply with all obligations and responsibilities and that neither entity would be liable for the acts and deeds of the other entity. LSA Section 21 covers the "Relationship of the Parties"; as follows:

> *Buyer and Seller agree that in performing their obligations hereunder Seller shall be an independent vendor, and not the agent, servant or employee of Buyer. Nothing contained in this Agreement shall be construed to constitute or create a joint venture, trust, mining partnership, commercial partnership, fiduciary relationship or other relationship between Buyer and Seller whereby either Party would be liable for the acts and deeds of the other Party hereto. The obligations and responsibilities of Seller under this Agreement shall operate jointly in favor of the Utilities in proportion to each Utility's respective ultimate ownership share in the Plant. Buyer shall only be entitled to have Seller perform hereunder jointly for the benefit of all the Utilities, and no one Utility shall be entitled to any performance by Seller on its behalf separately.*

Under LSA Section 21, it was established that CCMC and CS are separate entities and are not liable for the "obligations, duties, and responsibilities" of the other entity. As such, compliance with environmental laws is a responsibility which each entity is required to comply with independently. In addition, Section 21 of the LSA is consistent with the Department's air quality record for each facility; which contains approximately 2½ years of CCMC records and over 40 years of CS records. The Department has received environmental compliance documentation from each facility including, but not limited to annual emissions/production reports, compliance test reports, Department facility inspections, annual certifications (for CS's Title V permit), and

all other compliance activities and communications. For air quality actions, the Department works directly with the environmental officials from each facility and has not observed either CS or CCMC dictating decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements of the other entity. The Department has not observed either facility even involving the other in air related activities. It should also be noted that the previous coal supplier (Dakota Westmorland Corporation) for CS also operated and was regulated as a separate source.

As demonstrated by the environmental records and LSA Section 21, these sources are not under common control. Further, the Department evaluated whether LSA Section 5 "Development and Operation of the Mine" and/or Section 12 "Records and Audits" contained terms which would ultimately give authority to CS to dictate decisions regarding environmental compliance or operations of "pollutant-emitting activities" for CCMC. These sections give additional support for the separate source determination.

LSA Section 5.1.2(b) states:

> "*Seller shall operate the Mine and perform all land, engineering, geological, operational, administrative and other work required to supply lignite to Buyer under this Agreement.*"

While this statement does not specifically list or reference environmental related activities, these activities fall under "engineering", "operational" or "other work required" and, therefore, supports the delineation of environmental obligations as the responsibility of the Mine (CCMC).

In addition, Section 5.2.1(a) "Life-of-Mine Plan" (Plan) states:

> "*The Life-of-Mine Plan shall be prepared in accordance with sound engineering and design practices and Applicable Laws and shall include, but not be limited to, production schedules, staffing and equipment requirements, estimated costs per Ton using the cost categories identified in Section 7, a property acquisition plan, schedule and estimated budget, a mine development plan, schedule and budget, method of operation, anticipated lignite quality characteristics, reclamation and permitting schedules, estimated capital budget containing estimates of all capital expenditures, commitments, and loan/lease requirements, operating cost estimates, mine design, mine projection maps, mine progression and reserve studies, and other documentation reasonably requested by Buyer. Seller will permit Buyer's representatives to participate in the development of the Life-of-Mine Plan and any revisions thereto.*"

Notwithstanding CS retaining authority to approve the Plan, the Plan is required to "be prepared in accordance with Applicable Laws". Regardless of CS having authority to approve the Plan, CS cannot require anything in the Plan which would cause the CCMC to violate any applicable laws, including the NDAPCR. Therefore, CCMC maintains the ultimate authority to dictate decisions regarding environmental compliance.

Further, Section 12.3(a) which covers "Periodic Inspections" states:

"*Such inspection shall not be for any purpose or reserved right of controlling the methods and manner of the performance of the work by Seller under this Agreement, but shall be to assure Buyer that Seller is performing its obligations under this Agreement.*"

The intent of this section is for CS to ensure CCMC is currently meeting its contractual obligations to supply coal to CS and will continue to do so in the foreseeable future. It specifically states that the inspections are not for the purpose of controlling the operations of the mine. Controlling the operations of the mine, including the "pollutant-emitting activities" is therefore the responsibility of CCMC.

Using the guidance provided by EPA in the Meadowbrook Letter and after reviewing the LSA (including sections 5, 12, and 21), CCMC and CS are determined to not be under common control.

Conclusion

For aggregation of two facilities, all the criteria in both the two- and three-part tests must be met. If even one of these criteria is not met, the source(s) in question are to be considered separate with regards to all air quality regulations. Therefore, for the purposes of this memorandum, evaluation of contiguous or adjacent and major industrial grouping were not warranted and, subsequently, not completed.

Upon review of the information available, the Department has determined that Coyote Station does not exercise power or authority over Coyote Creek Mining Company which could affect applicability of, or compliance with, relevant air pollution regulatory requirements. Therefore, it is determined that the facilities are not under "common control"; accordingly, the Coyote Station and Coyote Creek Mining Company shall continue to be considered separate sources with regards to all air quality regulations. This determination has been made based on the facts of this situation and should not be interpreted as general guidance for all source determinations.

DES:

Attach: April 30, 2018 EPA Letter regarding Meadowbrook Energy, LLC